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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1966	)	**CC Docket No. 96-98**
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	**CC Docket No. 99-68**

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the petitions for reconsideration filed on June 14, 2001, regarding the *Order on Remand and Report and Order* ("*Remand Order*") released on April 27, 2001 (FCC 01-131) in the above-captioned proceedings. CompTel strongly opposes the petitions seeking reconsideration of the Commission's "mirroring" rule, while strongly supporting the petition for reconsideration and clarification submitted by Wireless World LLC regarding the Commission's "new markets" and "growth cap" rules. CompTel urges the Commission to act expeditiously to grant the moratorium on the "growth cap" rules requested by Wireless World.

I. THE "MIRRORING" RULE

CompTel opposes the reconsideration and stay petitions filed by various incumbent local exchange carrier ("ILEC") interests in opposition to the "mirroring" rule whereby ILECs desiring to take advantage of the Commission's rate prescriptions for traffic

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bound for Internet Service Providers ("ISPs") must accept such rates for all traffic subject to Section 251(b)(5) of the Communications Act.[1] *Remand Order* at ¶¶ 89-94.

While apparently agreeing that the Commission has authority to set rates for ISP-bound calls, the ILEC petitioners submit that, through the "mirroring" rule, the Commission has improperly sought to set reciprocal compensation rates, which Section 252(d) reserves to state regulators. In fact, the "mirroring" rule does not usurp state authority. The Commission adopted the rule as an integral part of its regulation of ISP-bound traffic, which the Commission held to be interstate traffic subject to Section 201 of the Communications Act. *Remand Order* at ¶¶ 52-65. To the extent the Commission is correct that ISP-bound calls are jurisdictionally interstate, the Commission has authority to adopt all necessary rules and policies, including the "mirroring" rule. Section 201(b) expressly states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[2]

Further, the "mirroring" rule is an essential part of the Commission's regulatory regime for ISP-bound traffic; without that rule the Commission could not achieve the objectives which it identifies as the justification for the *Remand Order*. In effect, the "mirroring" rule removes the "spread" between FCC-prescribed termination rates for ISP-bound calls and the often much higher reciprocal compensation rates that ILECs enjoy for traffic subject to Section

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1 These petitions include the following: (1) the petition for reconsideration and/or clarification, and the petition for partial stay, filed by the Independent Alliance on Inter-Carrier Compensation; and (2) the petition for reconsideration filed by Chocktaw Telephone Company, Electra Telephone Company, Haxtun Telephone Company, MoKan Dial Telephone Company, Park Region Mutual Telephone Company, South Dakota Independent Telephone Coalition, Tatum Telephone Company, and Walnut Hill Telephone Company.

2 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 154(i). *See also AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 377-79 (1999) (finding that Section 201(b) of the Act gives the Commission broad authority to implement regulations to carry out the various provisions of the Act, including Sections 251 and 252).

251(b)(5). Were the "mirroring" rule not in place, carriers would have an incentive to send non-ISP traffic to the ILEC through a carrier whose traffic ratio is in excess of 3:1 in order to minimize excessive reciprocal compensation payments to the ILEC.[3] To reward carriers for engaging in such obviously wasteful activity simply to benefit from an asymmetrically lower regulated rate, would create more "arbitrage" problems than the Commission sought to eliminate.

Similarly, the "mirroring" rule is necessary to prevent the Commission's regulations governing ISP-bound traffic from undermining local competition. If the Commission is going to adopt a rule that LECs must recover termination costs from their subscribers rather than from other carriers, it is critical for local competition that such a rule applies to both CLECs and ILECs alike. In order to avoid anti-competitive discrimination, the Commission must retain the "mirroring" rule. Conversely, were the Commission to remove the "mirroring" rule, it would have to remove all other rules and policies adopted in the *Remand Order* to avoid harming the public interest.

In the context of the *Remand Order*, the "mirroring" rule does not encroach upon state authority over reciprocal compensation rates. No ILEC is required to opt into the Commission's regime governing ISP-bound traffic. Hence, if any state regulator believes that the Commission's rates for ISP-bound traffic are inappropriate for an ILEC's traffic subject to Section 251(b)(5), that state is entitled to implement its policies by precluding the ILEC from

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[3] A CLEC who is terminating traffic for the ILEC's customers in excess of the 3:1 ratio has an incentive to terminate as much traffic as possible on the ILEC's network, so that its traffic imbalance is closer to the 3:1 ratio. By adding traffic from its network to the ILEC's network, an out-of-balance CLEC "earns" the difference between the reciprocal compensation rate in its agreement and the "information access" rate for every additional minute it can put on the ILEC's network. Thus, a dramatically out-of-balance CLEC would have an incentive to terminate other carriers' minutes onto the ILEC network at lower rates than those charged by the ILEC.

opting into the Commission's regime. The *Remand Order* does not force any state to accept the Commission's ISP termination rates for non-ISP Section 251(b)(5) traffic. Indeed, it is CompTel's view that, under the *Remand Order*, no ILEC can opt into the Commission's rate regime for ISP-bound traffic unless and until the ILEC has first secured all necessary state approvals for the application of those rates to non-ISP traffic under Section 251(b)(5).

It is not relevant to argue, as the ILEC petitioners do, that the "mirroring" rule prevents them from recovering their termination costs through intercarrier payments. The Commission adopted its rate schedule for ISP-bound traffic not as a cost recovery mechanism, but as a transition to bill-and-keep. The Commission stated that LECs must recover their termination costs from their own subscribers, and that rationale applies just as much to ILECs as to CLECs. Should the Commission determine that the "mirroring" rule should be removed on the ground that it interferes with cost recovery by the ILECs, then the Commission should repeal the entire ISP termination regime to ensure non-discriminatory treatment of all local exchange carriers.

Lastly, the ILEC petitioners complain that they did not receive the requisite notice that the Commission was considering adopting rules to govern non-ISP bound traffic. CompTel has some sympathy for this claim because, in CompTel's view, the Commission failed to provide adequate notice of other critical elements of its rate regime, including the "new markets" and "growth cap" rules.[4] Because the ILECs' notice claim is no stronger than the challenge mounted

4 CompTel's sympathy has its limits, however. The ILECs have always been on notice that the ability of regulators and industry to separate ISP from non-ISP traffic is an issue in these proceedings. Hence, the ILECs have always known that any regulations adopted by the Commission were likely to directly or indirectly affect non-ISP traffic streams. It is too late in the day for the ILECs to pretend that ISP and non-ISP traffic streams are completely separate so that one can be regulated without regard to the other.

to the "new markets" and "growth cap" rules, CompTel urges the Commission to defer this issue until the notice issue is fully resolved in the pending appeals. In any event, given that the "mirroring" rule is an integral part of the rules and policies governing ISP-bound traffic, the Commission would have to abjure the *Remand Order* in its entirety were it to conclude that it failed to provide adequate notice of the "mirroring" rule.

II. THE "NEW MARKETS" AND "GROWTH CAP" RULES

CompTel strongly supports the petition filed by Wireless World seeking reconsideration or clarification of the Commission's "new markets" and "growth cap" rules.[5] The "new markets" rule states that where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of the *Remand Order*, the carriers shall exchange ISP-bound traffic on a bill-and-keep basis. The "growth cap" rules limit the amount of ISP-bound traffic for which a carrier may receive compensation under the Commission's regime. Wireless World asks the Commission to hold that the "new markets" rule does not apply in situations where a requesting carrier submitted an interconnection request to the ILEC prior to adoption of the *Remand Order*, and that the Commission should suspend the "growth cap" rules for a period of at least one year.

Without compromising its position that the "new markets" rule should be completely eliminated, CompTel supports Wireless World's request that, to the extent the Commission retains that rule, it should not apply where the CLEC was already in interconnection

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[5] CompTel also supports Wireless World's request that, to the extent the Commission retains any portion of the "new markets" rule, the mandatory bill-and-keep regime under that rule should not apply to ILECs who decline to opt into the Commission's regime for ISP-bound traffic. The reasons why the Commission adopted the opt-in approach apply just as much to a mandatory rate of $0 as they do to the Commission's transition schedule of termination rates for ISP-bound traffic.

negotiations with the ILEC when the order was adopted. The Commission based its cut-off on the empirically erroneous assumption that CLECs did not act in reliance upon the previous reciprocal compensation rules before they actually began to exchange traffic with the ILECs. In fact, as Wireless World has shown, CLECs incur significant costs to initiate and conduct interconnection negotiations with ILECs. Further, in many cases, such negotiations were not completed, or did not result in the exchange of traffic, by the adoption date of the *Remand Order* due to the ILECs' dilatory conduct. The Commission should not pull the rug out from under CLECs who have already factored reciprocal compensation revenues for ISP-bound traffic into their ongoing business plans, nor should it reward the ILECs for their intransigent behavior against new entrants. Expeditious grant of Wireless World's request is necessary to ameliorate the anti-competitive impact of the "new markets" rule.

CompTel also supports Wireless World's request that the Commission adopt a moratorium on the "growth cap" rules for a period of at least one year.[6] Because the adverse effects of that rule will soon be felt in the marketplace, CompTel urges the Commission to act expeditiously to establish this moratorium.

The Commission's "growth caps" are punitive when applied to new entrants into a market. In particular, those rules ensure that new entrants receive the prescribed ISP termination rates for a comparatively smaller portion of their traffic stream than more established LECs. Indeed, new entrants will have no incentive to expand and grow their operations for ISP customers if they cannot receive compensation from the ILECs for the costs they incur to

[6] As with the "new markets" rule, CompTel's support of Wireless World's suspension request should not be construed as consent to the re-imposition of the rule after the suspension period ends. CompTel strongly supports the challenge to the "growth cap" rule in the pending appeals of the *Remand Order*.

terminate ISP-bound calls.[7] As a result, the "growth cap" rules are an enormous barrier to entry and full local competition as envisioned by Congress when it adopted the Telecommunications Act of 1996. New entrants no longer have any incentive or ability to compete for the business of ISP customers.

The effects of the "growth cap" are particularly pernicious in today's market when many CLECs have cut back their service or ceased operations altogether. Regulators in Texas and other states desire for other CLECs to pick up the ISP customers of such CLECs to ensure that they – and their end-user subscribers – continue to receive uninterrupted service. However, the "growth caps" prevent CLECs from receiving intercarrier payments for the costs they incur to serve the ISP community, and market forces preclude the recovery of these costs from customers. Thus, the growth cap eliminates incentives of new entrants to mitigate some of the current market volatility for ISPs and the ultimate consumers. In today's market, the "growth cap" has the perverse effect of maximizing the adverse impact on consumers of the current volatility in the LEC marketplace. By suspending that rule for at least one year, the Commission will avoid undue hardship for ISPs and their subscribers while the industry proceeds through the current period of consolidation.

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7 As CompTel noted in note 3 *supra*, the new entrant will be unable to recover per minute charges from the end user as long as its competitors either cannot, or need not, impose the same cost structure on ISP customers.

III. CONCLUSION

CompTel submits that the Commission should deny the petitions filed by the ILEC petitioners while granting the petition filed by Wireless World.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice Burruss, hereby certify that on this 23rd day of July, 2001, copies of Comments of the Competitive Telecommunications Association in CC Docket No. 96-98 and CC Docket No. 99-68 were served by hand or first-class mail on the following:

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